

# Watch words around potential witnesses



By Bart  
A. Lazar

The marketing community seems closely knit to me, such that there often are informal discussions of things such as disputes between parties. Typically, I try to encourage such discussions—within certain guidelines. In my view, a structured business discussion, mediation or other

form of alternative dispute resolution between parties is beneficial as a reasonable probability exists that two fully informed businesspeople may strike a business deal that will resolve a business dispute. And after litigating disputes in the marketing and intellectual property areas for more than 15 years, my view is that a sensible business resolution is preferable to litigation.

My view does not extend, however, to substantive discussions about ongoing litigation with third parties. Certainly, in significant litigation, a company needs to create position statements for the media, customers and vendors to state the views of the company. However, communications to the media or third parties must be carefully monitored lest a company brings on more litigation by giving its opposing party a potential claim for unfair competition, defamation or tortious interference with existing or prospective advantage.

While caution should be exercised when communicating about litigation, extreme caution must be exercised when communicating with potential witnesses in a litigation—if such communications are permitted at all. This month, we have a cautionary tale, involving the law and an individual widely regarded as a marketing genius, who hurt himself and his company in litigation by calling a friend who was supposed to be a witness for his opponent in a lawsuit.

## MARKETING AND THE LAW

But first, a few words about litigation. Litigation between companies is never pleasant. When two businesses can't work something out, they turn it over to their lawyers to duke it out. As noted above, one of the first things I try to do is to see if any possibility of working out some sort of business resolution exists, in order to avoid litigation.

The fact patterns that lead to litigation, and litigation itself, typically end up like Akira Kurosawa's *Rashomon*, in that each party has his own story and the "real story" often

does not get told at trial. Justice is not only blind, it is typically slow and expensive. If a case goes to trial, the finder of fact (namely, the judge or the jury) tries to discern fact from fiction, or fact from fact, by evaluating both the credibility and reliability of witnesses as well as outside factors that may affect a witness's credibility or reliability. It is not space-station science to recognize that the best witnesses to use to prove that your side of the case is correct will usually be third-party witnesses. These witnesses' testimony often is seen as more credible and reliable by finders of

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fact because they typically do not have (or appear not to have) any stake in the outcome.

Judges and juries also often rely on expert witnesses. Expert witnesses are typically "hired guns" who have a reasonably high level of expertise in a substantive area or a particular type of business.

Therefore, when planning or participating in litigation, one of the biggest decisions to make is whether to get customers, vendors



or other third parties involved in a case as fact witnesses or as expert witnesses. The decision to get a customer or client involved in litigation is always difficult, just as the decision to get involved is difficult for a potential fact or expert witness—especially since they know each other.

Sometimes opponents in litigation or witnesses talk about cases at trade shows, over the phone, even over a drink, but a recent case involving successful marketer Ty Inc. of Westmont, Ill., indicates that you need to be careful what you say to a witness or a potential witness in a lawsuit you are involved in. For Ty, its CEO's conversation with an old friend and mentor regarding whether he would testify as an expert in a case against Ty may have forced the toy maker to forfeit a \$716,046.47 judgment, plus pay its opponents' attorneys fees.

How could this happen? Ty, the owner of the well-known Beanie Babies and other related trademarks, sued a company called Softbelly's Inc. of Van Nuys, Calif., that made a competing product called Screenie Babies. The case went all the way to a jury trial, after which the court found as a matter of law that Softbelly's had infringed and granted Ty the judgment.

After the trial, Softbelly's tried to vacate the judgment, claiming that Ty CEO Ty Warner had tampered with one of Softbelly's witnesses. As it turns out, Softbelly's had tried to recruit a toy industry executive, Harold Nizamian, to testify as an expert witness at trial. Nizamian knew Warner from having worked together years earlier when Nizamian was the president of Dakin Inc., another plush toy company. Nizamian was originally reluctant to testify against Ty, but ultimately decided, according to the court, that since he felt that a small manufacturer was being attacked by a Goliath, he would consider getting involved, and ultimately agreed to (though he was not required to) testify at trial.

According to the court, when Warner found out that Nizamian might testify against Ty and claim that the term "beanies" was generic, Warner asked his counsel whether he could call Nizamian and ask whether Nizamian was, in fact, coming to Chicago to testify at the trial. His counsel

indicated it would be OK to call Nizamian.

What happened during the conversation between Warner and Nizamian three days later was the subject of disputed testimony. However, the trial court recently found that Warner started by exchanging pleasantries with Nizamian, but then proceeded to talk about the substance of the case, how it was a serious case and that Warner could be harmed if Nizamian got involved in the case.

While the court found that Nizamian was not intimidated by his conversation with Warner, one day after he spoke to Warner, Nizamian informed Softbelly's counsel that he was not going to testify at the trial. Why? According to the court, it was because of what Warner had said during their telephone conference the day before.

The court found that, despite the dispute over the content of Warner's communication with Nizamian, Warner telephoned Nizamian with the intention of dissuading Nizamian from testifying and that, as a result of the communication, Nizamian was dissuaded from testifying. The court found that this act was sufficient to take away Ty's substantial victory and have the case retried. In addition, as a sanction for what it called witness tampering, the court ruled that in any retrial of the case, Ty would not be able to recover any damages, costs or attorney's fees from Softbelly's, and that Ty would also have to pay Softbelly's attorney's fees for bringing the matter to the court's attention.

I hope your company will never be embroiled in litigation. But if it does happen, please be mindful of the persuasive effect that communications can have on the recipients of the communication—not just marketing communications, but person-to-person. Work with your attorney to establish which communications are or are not appropriate, and frame guidelines for such communications. ■

Bart A. Lazar is a partner who specializes in counseling, business transactions and litigation in intellectual property, advertising and promotions, privacy, Internet and related matters for Chicago-based Seyfarth Shaw LLP. He can be reached by e-mail at [BLazar@seyfarth.com](mailto:BLazar@seyfarth.com) or [news@ama.org](mailto:news@ama.org).

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